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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-207

LARRY KEITH DOBBS,
Petitioner,

v.

STATE OF GEORGIA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

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The Petitioner respectfully prays that a writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on February 9, 1978. The Supreme Court of Georgia denied certiorari on April 5, 1978 (Appendix B).

OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet reported, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on February 9, 1978. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on april 5, 1978. A copy of said denial is set forth herein in Appendix B. The Court's jurisdiction is invoked under Title 28 United States Code § 1257(3).

QUESTIONS PRESENTED

1. Is any rational basis upon which a state may totally prohibit and impose criminal penalties for the dissemination of devices designed or marketed as useful primarily for the stimulation of human genital organs?

2. Does a state statute which defines *scienter* in a manner which authorized obscenity convictions on mere "constructive" knowledge impermissibly chill the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution?

3. May a warrantless mass seizure of allegedly obscene material be sustained under the plain view doctrine consistent with First and Fourteenth Amendment guarantee?

4. Are the press materials charged against Appellant not obscene as a matter of law, constituting expression protected under the Fourth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, and Fourteenth Amendments to the United States Constitution are set forth in Appendix C hereto.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County of distributing obscene materials, the charges being predicated upon the sale of two magazines at the Houston Street Book Store, and the warrantless seizure of alleged sexual devices. Petitioner was alleged to have been an employee of the store at the time of the mass seizure and the sale.

Petitioner was then tried before a jury in the Criminal Court of Fulton County and found guilty. He thereafter appealed his conviction to the Georgia Court of Appeals which affirmed the trial judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASONS FOR GRANTING THE WRIT

I.

THERE IS NO RATIONAL BASIS UPON WHICH A STATE MAY TOTALLY PROHIBIT AND IMPOSE CRIMINAL PENALTIES FOR THE DISSEMINATION OF ANY DEVICE DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS.

The state does not contend that the bulk of the material charged against Appellant, the alleged sexual devices, are

obscene under Georgia Criminal Code §26-2101(b) which sets forth the standard three part *Miller* obscenity test. Rather, they are alleged to violate Georgia Criminal Code §26-2101(c) which provides:

> "Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

The seriousness of this question is first demonstrated by the fact that the above definition contains none of the Constitutional limitations upon obscenity set forth by this court in *Miller v. California,* supra. Material may be found obscene under this statute even though it does not meet any of the three tests for obscenity set forth by this Court as Constitutionally necessary in the *Miller* decision. The seriousness of the question here presented is further demonstrated by the fact that the total prohibition of such devices bears no reasonable relationship to any conceivable public interest and has no rational basis.

In *Miller,* the Supreme Court noted that "state statutes designed to regulate obscene material must be carefully limited." 413 U.S. 15, at 23-24. As a result of the need for careful limitation, Supreme Court confined the permissible scope of any state obscenity statute to the regulation of materials which "depict or describe sexual conduct." 413 U.S. 15, at 24. It is clear that, whatever their intended use, the items do not depict sexual conduct.

Further, the Court in *Miller* went on to hold that any state obscenity offense must be limited to those materials which meet a three part test:

> "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. 15, at 24.

The statute in question here sets forth an obscenity offense which is not limited to the category which the Supreme Court found acceptable in *Miller.* It is thus clearly unconstitutional for authorizing the suppression of material as "obscene" even though such material may not appeal to a prurient interest in sex, may not portray sexual conduct in any way, and may possess serious literary, artistic, political or scientific value.

Further, the statute is unconstitutionally vague in its definition of prohibited devices. A novelty item may be marketed or intended as an inducement to humor, but the vendors of such items can only guess as to what is meant by the phrase "intended or marketed primarily for the stimulation of human genital organs." It is clear that in the First Amendment area "government may regulate . . . only with narrow specificity." *NAACP v. Button,* 371 U.S. 415, 433 (1963). In so regulating, the State must avoid the use of language which is so vague that "men of common intelligence must necessarily guess as to its meaning." *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

Petitioner does not contend that a properly instructed jury could not find the items obscene if they were judged under the *Miller* obscenity standards. Petitioner concedes that similar devices have been held obscene under the three part *Miller* test in other cases. Petitioner objects that the devices in this case were judged not by that constitutionally

acceptable three part standard but rather by a standard of obscenity which this Court has never approved.

In addition to falling outside any constitutionally approved standard of obscenity, the statute carries the state into areas where it has no conceivable public interest. In this regard it is important to note that the statute is not limited to the commercial utilization of sexual devices, rather, it prohibits any sale of any such device to any person. Individuals are thus prohibited from purchasing such items even for their own personal private use on their own bodies in the privacy of their own homes. The state has no possible interest in prohibiting an adult from masturbating in the privacy of his or her home. Likewise, there can be no rational basis for prohibiting the sale of items which such individuals might utilize in so masturbating.

This court has often invalidated legislation because it lacked a reasonable relationship to any public interest. In *Pierce v. Society of Sisters,* 268 U.S. 518 (1925), the court held an Oregon mandatory public school attendance statute invalid, noting:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S., at 636.

In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the court overturned a state statute prohibiting the study of the German language, stating:

> "The problem for our determination is whether the statute as construed and applied unreasonably in-

> fringes a liberty, guaranteed . . . by the Fourteenth Amendment . . . the established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S., at 399-400.

Even assuming, arguendo, that the state has some interest in regulating certain uses to which sexual devices might be put, the statute here in question is overbroad in its total prohibition of such devices. In *Shelton v. Tucker,* 364 U.S. 479 (1960) this court stated in this regard:

> "In a series of decisions, this court has held that, even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly reserved." 364 U.S., at 488.

In his concurring opinion in *Griswold v. Connecticut,* 381 U.S. 479 (1965), Mr. Justice Goldberg reiterated the importance of using the least restrictive alternative when government regulation is in question:

> "In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the state simply on a showing that a regulatory scheme has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is com-

> pelling. *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy.' *McLaughlin v. Florida*, 379 U.S. 184, 196." 381 U.S., at 497.

This ca.. is similar to that presented in *Griswold, supra*, where this court struck down a statute making any use of contraceptives a criminal offense. In finding that law unconstitutional, the court noted that it impinged upon a protected right to marital privacy. The prohibition in this case impinges upon the same fundamental right. The statute is not limited to the prohibition of the sale of such devices to minors not to the prohibition of the commercial use of such devices. It merely sweeps all devices within the definition of obscenity and therefore criminalizes their distribution to anyone, including married couples.

Although this court may not specify how a legislature is to meet legitimate social ends, it may prohibit the utilization of means that are unduly restrictive of individual freedom, *Dean Milk v. Madison*, 340 U.S. 349 (1951).

All of the above argument proceeds on the premise that the state has some legitimate interest in regulating the uses to which sexual devices might be put. Petitioner does not concede that the state has any such interest. But, even if it does, no possible rational basis can be imagined for total prohibiton of such devices. No conceivable public interest can be served by prohibiting an individual from purchasing an item to further his own masturbation or to utilize in sexual activities with his spouse.

In answer to this argument, the Supreme Court of Georgia merely noted that the Georgia obscenity statute had previously withstood constitutional attacks based upon grounds of vagueness and overbreadth. The court held that subsequent amendments made no substantive change and the court thus relied upon its prior decision in *Dyke v. State*, 232 Ga. 817, 209 S.E. 2d 166 (1974).

The *Dyke* decision, however, does not address any of the issues presented here. That case merely involved a film alleged to be obscene under the common three part obscenity standard which Petitioner does not challenge. It did not involve any alleged sexual devices and that portion of the statute prohibiting sexual devices, Georgia Criminal Code §26-2101(c), had not even been passed as part of the law when *Dyke* was decided. The decision in *Dyke* thus offers no support for the court's decision below since the law Petitioner challenges was not even passed at the time *Dyke* was decided.

II.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter:*

> ". . . the word 'knowing', as I have used it, shall be deemed to be the actual knowledge or constructive

> knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents if he has the knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." (Te. C-43)

This instruction is in accord with the terms of Georgia Criminal Code §26-2101(a) which Petitioner challenges. The seriousness of this question is well demonstrated by the fact that *certiorari* has been granted on this precise issue in *Ballew v. Georgia,* No. 76-761, question number 2, *certiorari* granted January 25, 1977. The *Ballew* case was decided on other grounds, however, and this Court therefore did not reach the issue of "constructive knowledge." See *Ballew v. Georgia,* 435 U.S., (1978) (*Ballew I*), decided March 21, 1978. In *Ballew v. Georgia,* No. 77-1425, (*Ballew II*) decided June 12, 1978, the dissent by Justices Brennan, Stewart, and Marshall indicates that these Justices would have granted *certiorari* on the *scienter* issue in the following words:

> "I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted it in *Ballew I.* For this reason, I would grant certiorari."

Furthermore, the dissenting opinions by Justices Brennan, Marshall, and Stewart in *Sewell v. Georgia,* No. 76-1738, and in *Teal v. Georgia,* No. 77-790, both decided April 24, 1978, indicate that from a constitutional standpoint, jury instructions permitting a basinf of *scienter* on "actual or constructive knowledge" are impermissible under the Constitution of the United States.

Petitioner contends that predicating a conviction upon a finding of "constructive knowledge" is co

Petitioner contends that predicating a conviction upon a finding of "constructive knowledge" is constitutionally impermissible under *Hamling v. United States,* 418 U.S. 87 (1974), where this Court enunciated the constitutional minimum standard of *scienter* as follows:

> "We think the 'knowlingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter.* It is constitutionally sufficient that the prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials.' 418 U.S. at 123 (amphasis added)."

Consistent with the above statement from Hamling, Petitioner contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials with which he was charged. In addition, it is here submitted that the dissenting opinions by three United States Supreme Court Justices, namely Justices Brennan, Marshall, and Stewart in *Teal,* and *Sewell, supra,* amply demonstrate the substantiality of the question. Indeed, Justice Brennan, with whom Justice Marshall joined, dissenting, states with regard to the constitutionality of Georgia Code §26-2101(c):

> "In *Ballew v. Georgia,* 435 U.S. (1978), we granted certiorari to consider, but did not reach, the precise *scienter* issue now raised by appellant. . . I see no basis for concluding that a federal constitutional question sufficiently substantial to be granted review on certiorari is now so insubstantial to

require exercise of our mandatory appellate jurisdiction in this case." *Sewell, supra,* at 3.

The United States Supreme Court's dismissal of the appeals in *Teal, Sewell, and Ballew II* thus clearly did not go to the merits of the *scienter* arguments, especially in light of the recognition by Justices Brennan, Marshall, and Stewart of the importance of the question raised and the desirability of having various aspects of those issues further illuminated.

Petitioner submits that the instruction on *scienter,* as given by the trial Court, fails to meet the constitutional minimum standards of *scienter* set forth by this Court in *Hamling, supra.* As the Court is aware, the principles governing the issue of *scienter* in the area of First Amendment litigation originates with the decision in *Roth v. United States,* 354 U.S. 476 (1957).

In deciding *Roth v. United States, supra,* the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. See, e.g., *United States v. Petrillo,* 332 U.S. 1, 7-8 (1947); *United States v. Harris,* 347 U.S. 612, 624 n. 15 (1954); *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340 (1952); *United States v. Ragen,* 314 U.S. 513, 523-524 (1942); *United States v. Wurzbach,* 280 U.S. 396 (1930); *Hygrade Provisions Co. v. Sherman,* 266 U.S. 497 (1925).

The constitutional validity of the obscenity statutes involved in *Roth* rested therefore, in significant measure upon

the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material distributed was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California,* 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which were not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York,* 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S., at 511.

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the state with respect to the "stringent *scienter* requirement" and "vital element of *scienter,*" 383 U.S., at 507, 510 n.5, the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of

the books" was not to be read as a "modification of this definition of scienter." 383 U.S., at 510 n.9

Hamling, supra, sets forth that the prosecution must show that a defendant "had" knowledge of the content, character, and nature of the materials with which he is charged and that the jury must be thusly instructed. To hold otherwise would permit conviction solely on the basis of guesses and assumptions of police officers that a particular sexual device is obscene. To this effect, it is stated in the dissent in *Sewell, supra:*

> ". . . the constructive *scienter* requirement of §26-2101(a), at least as applied in appellant's trial, provides no reasonable assurance that persons will know or ought to know when they are likely to violate §26-2101(c)." *Sewell,* at 5.

The Justices thus recognize the impermissible chilling effect produced by the constructive knowledge instructions given in Petitioner's case. It is Petitioner's contention that when instructions of "constructive knowledge" are given, every purveyor of presumptively protected First Amendment material is at the mercy of an unpredictable jury determination that some facet of the title or cover of the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it.

Thus, unless a statute is clear as to what conduct is prohibited, conviction can only be based on unconstitutional conjecture warranting reversal. Erroneous instructions by the Court were given in *Fortner v. State,* 528 S.W.2d. 378 (Ark. 1975). Here the defendants were convicted of selling an obscene motion picture film and they appealed. The Supreme

Court of Arkansas held that the evidence as to one of the defendants was insufficient to support the conclusion that she had knowledge that the film sold was obscene. The *scienter* requirement was thus not fulfilled, and the jury's verdict as to her, therefore, finding her guilty of unlawful sale of an obscene film, in the Court's opinion, had to have been based on surmise or conjecture and her motion for directed verdict should have been granted. The *scienter* required to sustain a conviction for the unlawful sale of obscene motion pictures is more than a mere belief which warrants further inspection or inquiry. The trial Court's instructions which read:

> "As used herein, 'knowingly' means having a general knowledge of, or reason to know, or a belief which warrants further inspection or inquiry of the character and content of a film which is reasonably susceptible of examination by the defendant." 528 S.W. 2d at 381,

were clearly erroneous as to the portion reading: "or a belief. . ." For these reasons, the Supreme Court of Arkansas reversed the judgment as to both appellants and remanded for a new trial.

Not only are jury [illegible] of "constructive knowledge" unconstitutional [illegible]tion of Petitioner's First, Fourth, and Fourteenth Amendment rights under the United States Constitution, they are also contrary to the rulings of the majority of states in the United States who recognize that the constitutional minimum standard of *scienter* requires actual knowledge, and not mere constructive knowledge, whether it be proved by direct or circumstantial evidence. These decisions may be categorized into a three level approach, namely (a) actual knowledge of the content, character and nature of the

material; (b) specific or reasonable awareness of the content, character, and nature of the material; (c) knowledge of the character, nature and content of the material.

The first level approach as to "actual" awareness may be found in *Ginzburg v. United States*, 383 U.S. 463 (1966). In this case, the appellant was convicted pursuant to *Title 18 U.S. C.* §1461 for knowingly sending obscene matter through the mails. The evidence clearly established that the appellant's materials were created, solicited, advertised, and pandered on their appeal to prurient interest: The appellant publisher was found to have deliberately emphasized the sexually provocative aspects of the material through his advertisements and circulars.

Justice Brennan, speaking for the majority, assumed that the material in the abstract could not have been ruled obscene, but he found a violation of the statute when the publications were viewed "against a background of commercial exploitation of erotica solely for the sake of prurient appeal," *supra* at 466. As evidence of this background, he pointed to the fact that the appellant had sought mailing privileges from post offices in Blue Ball and Intercourse, Pennsylvania. Thus, *scienter* was established by the appellant's purposeful and deliberate emphasis in advertising material that would appeal to prurient interest; therefore, it was in effect a proclamation on his part that the material was obscene.

It is significant to note that the appellant's marketing technique by virtue of the fact that it was in and of itself "pandering" was significant in the Court's determination that the appellant had actual knowledge of the explicit nature of the material.

In *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1960), *certiorari* denied, 365 U.S. 859 (1961), the defendant was convicted of knowingly mailing obscene material. The material consisted of unretouched photographs which the appellant admitted he purposefully designed to appeal to homosexual interests. The Court held the photographs to be hard-core pornography and stated that "there could be no possible avoidance of *scienter.*" Thus, the element of *scienter* was predicated upon the appellant s admitted awareness of the character of the material and his personal involvement in the actual photographing, assembling, and mailing of the material. Thus, "knowingly" as interpreted by the Court here was based on the appellant's actual awareness of the nature of the material he deposited in the mails.

In *United States v. Ewing*, 445 F.2d 945 (10th Cir. 1971), vacated and remanded on other grounds, 413 U.S. 913 (1971), the defendant was convicted of knowingly mailing obscene material. In this case, the defendant's knowledge of the explicit nature of the material was based on the testimony of his secretaries, business partners, and photographic models who testified that the defendant personally participated in the production of the material which was specifically designed to appeal to a sado-masochistic interest. The Court held that the "calculated purveyance of filth" found in *Mishkin v. New York*, 383 U.S. 502 (1966) was unquestionably present. Thus, *scienter* was established on the basis of the defendant's personal involvement in the production of the publications and his purposeful intent to create material which was specifically designed to appeal to a sado-masochistic type. It is apparent, therefore, that the *scienter* requirement was fulfilled by the defendant's *actual* knowledge of the material.

The issue of actual awareness was again addressed in *Hanf v. State,* 560 P.2d 207 (Okla. Ct. Crim. App. 1977). Refuting defendant's contention that the state failed to introduce sufficient evidence in *scienter* to justify the giving of circumstantial evidence instructions to the jury, the Court of Criminal Appeals of Oklahoma stated:

> "*Scienter,* a specific awareness of contents, which makes the publication obscene, is a necessary element of an obscenity statute. . . *Scienter* does not mean that a defendant must have been aware at the time he sold the publication that the material it contained was obscene. It requires only that he was aware of the *actual* contents of the publication." 560 P.2d 210 (Emphasis added.)

The Court thus recognized that it is not a general, but a specific awareness on the part of the defendant, which must be proved to establish *scienter.* The proof require is not that the defendant was specifically aware of the legal obscenity of the publications sold, rather the proof required is that the defendant was specifically aware of the actual contents of the material at the time of sale.

Actual knowledge could not be proved in *Commonwealth v. Thureson,* 357 N.E.2d 750 (Mass. 1976). In this case, the appellant had worked in a bookstore for three days. She claimed that she did not know for whom she worked, and upon being questioned, responded to the police officer, that although she had a "pretty good idea" what was in the peep-show machines, she had never viewed the films. From these facts, the Supreme Judicial Court of Massachusetts reasoned that the prosecution failed to produce evidence "from which

a jury could conclude beyond a reasonable doubt that the appellant had seen, or should have seen or otherwise had knowledge of, the materials' contents." Thus even though the defendant should have had knowledge of the contents, and even though she had a general idea of what was in the machines, she did not have actual knowledge, and the Court reversed appellant's conviction.

The second and third level approach by state and federal courts to the type of knowledge sufficient to fulfill the *scienter* requirement involve decisions which show the personal participation, words, acts, and conduct of a defendant, which clearly prove some cognizable knowledge of the contents, nature and character of materials the defendant transported, shipped, created or disseminated. Thus, in *Kingsley Books, Inc. v. Brown,* 334 U.S. 436 (1957), a New York statute which authorized local authorities to bring an injunction suit against any person selling or intending to sell obscene materials, and to seek an injunction against further sale of the material pending the outcome of the litigation. The statute provided the seller with a opportunity to contest the charge of obscenity, through a prior adversary hearing, before any penalty attached. It is significant to note that the appellant had consented to the issuance of the injunction, and he did not raise the issue of an adversary hearing within the time limit provided by the statute. After the issuance of the injunction, but before the trial judge's determination that the material was obscene, the appellant continued to distribute the material in question. In upholding his conviction for disseminating obscene material, the Court held that this type of prior restraint procedure was constitutionally permissible in that it afforded the appellant adequate safeguards. It is significant to note that *scienter* as an element of the offense of "knowingly disseminating obscene books" was established by the fact that the appellant knew

that the books he continued to disseminate were *questionably obscene.* Thus, he continued to disseminate them at his peril. It is apparent, therefore, that where there is conclusive proof of the sale of obscene material by one who knows the questionable nature of what he is selling, *scienter* is established.

In *United States v. Hochmon,* 277 F.2d 631 (7th Cir. 1960), the defendant was convicted of knowingly receiving copies of obscene material transported in interstate commerce. The evidence disclosed that the books he received were personally selected and scrutinized by him before he ordered them. Thus, the Court held that one who was shown to have scrutinized the contents of the material is charged with the knowledge of its nature. Thus, scienter was predicated upon the defendant's (actual) awareness of the explicit nature of the materials.

In *Kahm v. United States,* 300 F.2d 78 (5th Cir. 1962), *certiorari* denied, 82 S.Ct. 949 (1962), the defendant was convicted for knowingly using the mails for the delivery of advertisements giving information as to where obscene material might be obtained. The element of *scienter* was predicated upon proof that the defendant had personally selected and published the material for transmittal, and he further admitted that he had knowledge of the contents. Thus, the evidence was sufficient to show that the defendant mailed what he knew to be sexually explicit. It is clear, therefore, that "knowingly" as interpreted by the Court was based on the defendant's admitted awareness of the nature of the material to be mailed.

In *United States v. Brown,* 328 F.Supp. 196 (D.C. Va. 1971), vacated and remanded, 413 U.S. 912, the defendant was convicted pursuant to *18 U.S.C.* §*1462* for "knowingly" using a common carrier for transporting copies of obscene books in

interstate commerce. The evidence which established that Brown had knowledge of the explicit nature of the books came from his business associates who testified that the defendant personally selected and scrutinized the books in question. It is significant to note that the defendant in this case personally selected the books from a large stock pool. Thus, *scienter* was established upon the grounds that the defendant personally having perused the books in his selection process, was, therefore, aware of their explicit nature.

In *Spillman v. United States,* 413 F.2d 527 (9th Cir. 1969), *certiorari* denied, 90 S.Ct. 265 (1970), the defendant was convicted of "knowingly mailing obscene material through the mail in violation of *18 U.S.C.* §*1461.* In this case, the evi-] dence clearly showed that the defendant was present at every stage of the production of the film, and took a pre-dominant role in the actual photography of the film. Thus, *scienter* was established by the defendant's *conduct,* which conclusively proved that he was aware of the film's content in that he actively participated in its creation.

In *Gold v. United States,* 378 F.2d 588 (9th Cir. 1967), the defendant was convicted pursuant to *18 U.S.C.* §*1462* of knowingly using a common carrier for carriage in interstate commerce of obscene films. The evidence showed that the defendant personally assisted in the processing, packaging and depositing of the films. Thus, the jury concluded that the defendant knew the content of the shipment, and that his conduct in participating in the packaging and depositing of the films was conclusive of the fact that he was reasonably aware of the explicit nature of the films.

Awareness of content was established more recently in *United States v. Kelly,* 398 F.Supp. 1374 (D.C., E.D. Mich.

1975). This case involved the conviction of a defendant indicted for knowingly using a common carrier for carriage in interstate commerce of obscene material, in which the United States District Court for the Eastern District of Michigan held that the only proof the government had to produce was that the defendant was aware of the contents of the matter shipped. This awareness of contents was furnished by a showing that the defendant wrote for credit from the shipper, and specifically noted missing titles. This conduct on the part of the defendant, then, constituted the outward manifestation of facts within the defendant's mind, and was sufficient to establish *scienter* of obscenity of the material shipped interstate by a common carrier.

The thread of commonality that runs through all of these decisions is that they required an *actual* (awareness) knowledge of the contents, nature and character of the materials, and not merely constructive knowledge. To the same effect, see *United States v. Goldstein*, 431 F.Supp. 974 (D.C., D. Kan. 1976); *People v. Williamson*, 24 Cal. Rptr. 734 (1962), *certiorari* denied 377 U.S. 944 (1963); *People v. Andrews*, 100 Cal. Rptr. 276 (1972); *State v. White*, 538 P.2d 1235 (Wash. Ct. App. 1975); *People v. Speer*, 52 Ill. App. 3d 203, 367 N.E.2d 372 (1977), *State v. Blair*, 32 Ohio St. 2d 237, 291 N.E. 2d 451 (1972); *Johnson v. State*, 351 So.2d 10 Fla. 1977); *State v. Yabe*, 114 Ariz. 89, 559 P.2d 209 (Ariz. Ct. App. 1977); *Wheeler v. State*, 35 Md. App. 372, 370 A.2d 602 (1977); *State v. Richardson*, 506 S.W.2d 488 (Mo. Ct. App. 1974); *State v. Grant*, 508 S.W.2d 14 (Mo. Ct. App. 1974); *Volkland v. State*, 510 S.W.2d 585 (Tex. Ct. CrimApp. 1974); *State v. Mollins*, 533 S.W.2d 231 (Mo. Ct.App.1975); *State v. Flynn*, 519 S.W.2d 10 (Mo. 1975); *State v. Hull*, 546 p.2d 912 (Wash. 1976).

Petitoner does not contend that the state may not prove his knowledge by circumstantial evidence. Rather, he merely contends that the knowledge proved, whether by circumstantial evidence or otherwise, must be "actual" rather than "constructive" knowledge. A properly instructed jury might well find that Petitioner "knew" the content of the magazines he sold whether or not he actually looked at them. Knowledge in this sense may be defined as a correct belief. It is this sort of knowledge that attorneys "know" that the new volume of of the United States Reports which just arrived in the mail contains opinions of the United States Supreme Court. They may be said to know this even before they personally inspect the volume.

Petitioner does not contend that he can escape criminal liability by refusing to review the material he distributes. If such were the case, some might refuse to review the material precisely because they "know" what they will find. In a very real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal.

What Petitioner does contend, is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's *scienter* standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such an inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith v. California*, 361 U.S. 147 (1969), and the constructive knowledge standard must thus be found constitutionally infirm.

III.

APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES WERE VIOLATED BY THE INTRODUCTION INTO EVIDENCE OF ALLEGEDLY OBSCENE ITEMS SEIZED BY LAW ENFORCEMENT OFFICERS WITHOUT A WARRANT.

The substance of the testimony at the trial was that a law enforcement officer purchased two magazines from Petitioner and thereafter arrested Petitioner and confiscated all the novelty items present. No warrant was obtained to seize the allegedly obscene items nor was any attempt made to secure one. As the officer testified, the warrantless mass seizure was conducted pursuant to his personal conclusion that the items were primarily intended for sexual stimulation.

The officers did not submit the question to a neutral magistrate for a determination of whether the items were obscene under Ga. Code §26-2101(c). There was no indication that the warrant could not be obtained or that it would be impractical to seek one. The officer testified that the devices were exhibited in a glass counter within the store and there is no indication that they would have been removed during the time it would take him to view the materials, describe his viewing to a neutral magistrate, and obtain a warrant. Indeed, the officer testified that Petitioner was the only individual working in the store at the time of his arrest, adn there was thus no one present to remove the goods had they been left in the store following his arrest. It is thus clear that the officer had ample opportunity to secure a warrant for the seizure of the items both before and after the arrest of the Petitioner.

The principles applicable to the warrantless seizure of allegedly obscene material were set forth by United States Supreme Court in *Roaden v. Kentucky*, 413 U.S. 496 (1973). The Court there held that the warrantless seizure of an allegedly obscene film was unconstitutional under the First, Fourth and Fourteenth Amendments. The Court noted that the determination of obscenity must be made by a neutral and detacned magistrate rather than a zealous law enforcement officer vigorously pursuing his role in adversary process of controlling crime. The Court thus noted:

> "The seizure proceeded solely on the police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to, focus searchingly on the question of obscenity.' " 413 U.S. 496, at 506.

The Court thought the issue was controlled by its prior decision in *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968). *Lee Art Theatre* held that the warrant for the seizure of allegedly obscene material may not be issued on the mere conclusory allegations of a police officer. In light of that holding, it is even more clear that an officer may not be allowed to make a seizure of such material with no warrant at all.

> "If, as Marcus and Lee Art Theatre held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a *fortiorari*, the officer may not make such a seizure with no warrant at all." 413 U.S. 496 at 506.

The same conclusion must be reached in this case, and the warrantless mass seizure of all the novelty items as "obscene" must be held unconstitutional. The Georgia Supreme Court,

in the *Sewell* case, relied upon by the Court of Appeals herein, held that the mass seizure was justified under the "plain view" doctrine in that the items were in plain view. The issue is not whether they were in view, however, but whether a police officer or a magistrate should make the determination of obscenity before any item is seized as obscene. The items in *Roaden, supra,* and in *Lee Art Theatre, supra,* were also in plain view, but this did not serve to sustain their warrantless seizure.

On the basis of the *Lee Art* and *Roaden* decisions alone, Petitioner submits that the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review is called for before such a decision can be affirmed.

IV.

THE MATERIALS CHARGED AGAINST APPELLANT ARE NOT OBSCENE AS A MATTER OF LAW AND SAID MATERIALS CONSTITUTE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the magazines "Thrust" and "Dildo Fingers No. 1". The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962). It was later expounded upon in *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed here recently in the case of *Jenkins v. Georgia,* 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." The Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the magazines "Sexmates" and "Dildo Lovers". An item of similar explicitness was before this Court in *Jenkins v. Georgia, supra.* In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Court there noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, noting:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards." 418 U.S. 153, 161.

The material presently before this Court is similar to that involved in the *Jenkins* decision. Whether or not the Court might find this material to be "soft core" pornography, it is clearly not "hard core" pornography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction. The Court quoted from *Miller* to the effect that:

> "No one [may be constitutionally prosecuted] for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core'* sexual conduct." 418 U.S. 153, at 160 quoting 413 U.S. 1, at 25.

The Court thus went on to reverse the conviction since the film "Carnal Knowledge" was simply not a "public portrayal of *hard core* sexual conduct." 418 U.S. 153, at 161.

The magazines "Thrust" and "Dildo Fingers No. 1" are simply not hardcore sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that the magazines constitute protected speech under the First and Fourteenth Amendments of the United States Constitution.

In light of this Court's pronouncement that no one may be constitutionally prosecuted in this area except for the sale of "materials which depict or describe patently offensive 'hard core' sexual conduct," 418 U.S., at 153, the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review if required before Petitioner's conviction may be affirmed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

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APPENDIX A

February 9, 1978

55167. DOBBS v. THE STATE. Sh-27

SHULMAN, Judge.

Appellant was convicted of distributing obscene materials in violation of Code Ann. §26-2101. This appeal follows.

1. Appellant challenges the constitutionality of Code Ann. §26-2101(c). As this case was first sent to the Supreme Court and subsequently transferred to this court, we are authorized to conclude that the constitutional questions raised have been decided. *Robinson v. State*, 143 Ga. App. 37 (1) (SE2d). The constitutionality of this statute has been finally and conclusively determined by our Supreme Court. *Sewell v. State*, 238 Ga. 495 (233 SE2d 187).

2. Remaining enumerations are controlled adversely to appellant by *Sewell v. State*, supra. See *Teal v. State*, 143 Ga. App. 47 (SE2d).

3. As all other enumerations were controlled adversely to appellant by prior decision of our Supreme Court, the only issue presented for this court's consideration involves the application of constitutional standards to the facts of this case. See, e.g., *Fishman v. State*, 229 Ga. 133 (189 SE2d 429).

In accordance with *Dyke v. State*, 232 Ga. 817, 821 (209 SE2d 166), we have made an independent appellate review of the material to decide the constitutional fact of obscenity. While this writer has the utmost respect for freedom of expression, the writer also recognizes that this freedom is not absolute. Oftentimes the line between protected speech and unprotected speech is a difficult one to draw. We had no such difficulty here. The materials and magazines are within the definition of Code Ann. §26-2101.

Judgment affirmed. Bell, C.J., and Birdsong, J., concur.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta 30334, April 5, 1978

Dear Sir:

Case No. 33498. Dobbs v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

Mrs. Joline B. Williams
Clerk

APPENDIX C

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law. . . abridging the freedom of speech, or the press. . ."

2. The pertinent provisions of the Fourth Amendment are:

   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the laws."

CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) copies of this Petition for Writ of Certiorari upon Leonard Rhodes, Assistant Fulton County Solicitor, 53 Civil-Criminal Courts Building, Atlanta, Georgia 30303, and upon Arthur K. Bolton, Georgia Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334, by depositing same in the U.S. Mail this 3rd day of July, 1978.

/s/Robert E. Smith

/s/Charles W. Boyle

1409 Peachtree Street, N.E.
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Supreme Court, U. S.
FILED
SEP 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-207

LARRY KEITH DOBBS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Room 53 State Court Building
160 Pryor Street
Atlanta, Georgia 30303
Counsel for Respondent

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IN THE

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NO. 78-207

LARRY KEITH DOBBS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I.

SECTION 26-2101(c) OF THE CRIMINAL CODE OF GEORGIA DOES NOT TOTALLY PROHIBIT THE DISSEMINATION OF DEVICES DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS, NOR IS THE STATUTE UNCONSTITUTIONAL FOR ANY REASON ASSERTED BY THE PETITIONER.

The statute under which petitioner was charged, tried, and convicted is Section 26-2101 of the Criminal Code of Georgia, Georgia Laws 1968, pages 1249, 1302, as amended by Georgia Laws 1971, page 344, and further

amended by Georgia Laws 1975, page 498, to read as follows:

26-2101 **Distributing obscene materials**

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing", as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently Offensive way, sexual conduct specifically defined in

subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

To fall within paragraph (c) of Section 26-2101 of the Criminal Code of Georgia, any person charged with an

Offense thereunder must, *knowing the obscene nature of the devices*, sell, lend, rent, lease, give, advertise, publish, exhibit, or otherwise disseminate the devices to another person, or possess them with intent to do so. The statute is therefore aimed at a particular segment of society, i.e., those who distribute material of a sexual nature, those who purvey filth for monetary gain. These persons must be assumed to possess specialized knowledge of the use and purpose of the things they sell. The statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices employed by persons who distribute such merchandise. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *U.S. v. Petrillo*, 332 U.S. 1, 7-8; and *Boyce Motor Lines, Inc. v. U.S.*, 342 U.S. 337, 340. The section in question is not void for vagueness in that men of common understanding must not necessarily guess at its meaning. Persons have fair warning of the prohibited conduct. *Bouie v. City of Columbia*, 378 U.S. 347. Additionally, sections of the code which relate to the same subject matter must be construed together. Section 26-2021 of the Criminal Code of Georgia (Georgia Laws 1975, page 402) makes the instrumental manipulation of another's genital organs for money a crime. When the two sections are read together, 26-2101(c) and 26-2021, the law is made clear that the distribution of instruments commonly and primarily used to masturbate or erotically stimulate the genital organs is prohibited conduct.

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C.A. 1462 and thereby obscene. *U.S. v. Gentile*, 211 F.Supp. 383 (D.C. Maryland 1962). The language in 18 U.S.C.A. 1462 has been held to be constitutional. *U.S. v. Orito*, 413 U.S. 139 (1973); *U.S. v. Reidel*,

402 U.S. 354; *U.S. v. 37 Photographs*, 402 U.S. 376; *Manual Enterprises v. Day*, 370 U.S. 478. A state court has applied the obscenity statute to artificial penises. *People v. Clark*, 304 N.Y.S.2d 326 (1969).

The statute in question here does not encompass conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in *Stanley v. Georgia*, 394 U.S. 557. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49; and *U.S. v. Orito*, 413 U.S. 139.

Petitioner contends that the standards or guide lines set forth in *Miller v. California*, 413 U.S. 15; 93 S.Ct. 2607 (1973), used in determining obscenity in press materials, applies to the devices described and prohibited by Criminal Code Section 26-2101(c). The Miller guide lines were set up by this court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States; freedom of speech and freedom of the press. The devices prohibited by Code Section 26-2101 are neither speech nor press materials and are therefore not protected by the First Amendment.

The petitioner compares the Georgia obscenity statute with that dealt with by the Supreme Court of the United States in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965); 85 S.C. 1678. The court there dealt with statutes prohibiting the use of contraceptives.

The Georgia statute does not prohibit the use of the devices described in Code Section 26-2101(c) by married couples or anyone else. As a matter of fact and law, the statute provides exceptions whereby persons can avail themselves of such devices, Code Section 26-2101(e). The procedure required in the exception is the same as that

required for dispensing most drugs, including those used for birth control.

The court in *Griswold*, supra, recognized a distinction between "forbidding the use of contraceptives rather than regulating their manufacture or sale." 381 U.S. 479, 485; 85 S.C. 1678, 1682 (9, 10).

The court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), again recognized a distinction between the rights of a theater and the rights of privacy of its customers. The court there recognized legitimate state interests in stemming the tide of commercialized obscenity, the interests of the public in the quality of life and the total community environment, the tone of commerce in great city centers, and possibly, the public safety itself. The court there mentioned the arguable correlation between obscene material and crime in holding that state interests are involved.

There are numerous statements and restatements in *Paris Adult Theatre I v. Slaton*, supra, reiterating the rights of the several states to legislate in matters dealt with by the Georgia Legislature in Code Section 26-2101. Some of the excerpts are:

> ". . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs . . . The same is true of the federal securities and antitrust laws and a host of federal regulations . . . Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of

pornography." 413 U.S. 49, 61; 93 S.C. 2628, 2637 (11).

". . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial explotitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data . . . It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice—those in politics, religion, and expression of ideas—are explicitly protected. Totally unlimited play for free will, however, is not allowed in our or any other society . . ." 413 U.S. 49, 63; 93 S.C. 2628, 2638.

". . . Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of *Stanley v. Georgia*, 394 U.S., at 568, 89 S.Ct., at 1249, and the marital bedroom of *Griswold v. Connecticut*, supra, 381 U.S., at 485-486; 85 S.Ct., at 1682-1683 . . ." 413 U.S. 49, 65; 93 S.C. 2628, 2639 (13, 14).

". . . We have declined to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." 413 U.S. 49, 66; 93 S.C. 2628, 2640 (17, 21).

The State of Georgia has a legitimate interest in the subject matter of Code Section 26-2101(c) and the same is not unconstitutional for any reason asserted by the appellant.

The issue presented here was presented in two recent cases in which the court dismissed the appeals for want of a substantial federal question. *Sewell v. Georgia*, ____ U.S. ____, 56 LEd 2d 76, 98 S.Ct. 1635 (1978); *Teal v. Georgia*, ____ U.S. ____, 56 LEd 2d 79, 98 S.Ct. 1639 (1978).

II.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowing', as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material only *notice of its contents.*

> ". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.
>
> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or

> might put on him the burden of explaining why he did not, and what such circumstances might be . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter", and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and purdent person on notice", while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware".

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the appellant herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the case of *Kuhns v. California*, ____ U.S. ____, 53 LEd 2d 1071, 97 S.Ct. 2938 (1977), this court denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "(be) aware of the character of the matter . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Ca. Rptr. 725, 737 (1976).

Petitioner concedes that proof of scienter may be made by circumstantial evidence. Respondent contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstantial evidence.

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take

the risk that he may cross the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the petitioner viewed the books is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

The precise issue presented here on scienter was presented in two cases recently dismissed on appeal for want of a substantial federal question, *Sewell v. Georgia*, ____ U.S. ____, 56 LEd 2d 76, 98 S.Ct. 1635 (1978) and *Teal v. Georgia*, ____ U.S. ____, 56 LEd 2d 79, 98 S.Ct. 1639 (1978). The same question was also presented recently in two cases in which petitions for Writ of Certiorari were denied, *Ballew v. Georgia*, ____ U.S. ____, No. 77-1425, decided June 12, 1978, and *Cargal v. Georgia*, ____ U.S. ____, No. 77-1426, decided June 26, 1978. In *Sherwin v. United States*, ____ U.S. ____, 23 Cr.L. 4089, 4091, No. 77-1196 decided June 19, 1978, the court denied petition for Writ of Certiorari to review the conviction where the jury was charged that scienter required was only "knowledge of sexual orientation" of materials shipped in interstate commerce.

III.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE DEVICES SEIZED BY THE OFFICER AT THE TIME PETITIONER WAS ARRESTED.

The officer purchased the magazines from the petitioner, the petitioner was arrested, and all the items that were *in plain view* and, in the opinion of the officer, designed or marketed as useful primarily for the stimulation of human genital organs were seized by the officer. No books or magazines were seized. The only books or magazines that were removed from the store were purchased.

The testimony of the Officer left no doubt that this was a store operated for the purpose of selling sexually oriented books, magazines, and devices described in Code Section 26-2101(c).

The petitioner contends that the devices seized are protected by the First Amendment to the Constitution and cites *Roaden v. Kentucky*, 413 U.S. 496 (1973) and *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1969) as cases controlling in the seizure of such devices. Needless to say, we disagree. Both the cases cited are cases dealing with the seizure of motion picture films from commercial theaters. We would agree that motion picture films, books, and magazines would not be subject to seizure under the same set of facts and circumstances as those in this case in which the devices were seized.

There is a vast difference in devices designed and/or marketed as useful primarily for the stimulation of human genital organs on the one hand, and motion picture films, books, and magazines on the other; and on the one hand, to seize films, books, and magazines without a prior judi-

cial determination would be a prior restraint of material protected by the First Amendment of the United States Constitution under the present decisions of our appellate courts, while on the other hand, the dissemination of material described in Code Section 26-2101(c), prohibited by Code Section 26-2101(a), would not be, and was not in this case, a prior restraint of material protected by the First Amendment.

This court in *Roaden v. Kentucky*, supra, recognized and made a distinction in making a determination as to reasonableness of the seizure, 413 U.S. 496, 501; 93 S.C. 2796, 2800 (1, 2).

The devices seized, not afforded protection under the First Amendment of the Constitution, are declared to be contraband under the provisions of Georgia Code Section 26-2104, and therefore subject to seizure under the same rules as other contraband such as illegal drugs, stolen merchandise, and other fruits of crime.

What a person knowingly exposes to the public, even in his own house or office, is not subject to Fourth Amendment protection. *Katz v. U.S.*, 389 U.S. 347, 351 (88 S.C. 507, 511) (1967).

Contraband items in plain view of police officers, in a place where the officers have a right and are authorized to be, are subject to and may be seized without a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443 (91 S.C. 2022) (1971); *Harris v. United States*, 390 U.S. 234, 236 (88 S.C. 992, 993) (1968).

The devices seized were in plain view of the officer while the officer was in a lawful position to view the items seized, and for that and the foregoing reasons asserted, no warrant was necessary to make a lawful seizure.

The same question presented here on the seizure of the sexual devices was also presented in *Sewell v. Georgia* and *Teal v. Georgia*, supra, and the appeals were dismissed for want of a substantial federal question.

IV.

THE MATERIALS CHARGED AGAINST PETITIONER ARE OBSCENE AND ENTITLED TO NO PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Upon review of the magazines involved, *Thrust* and *Dildo Fingers No. 1*, the court will find, as did the jury and the Court of Appeals of Georgia, that they are hard core pornography and obscene under the standards announced in *Miller v. California*, 413 U.S. 15 (1973) and the definition which followed in Section 26-2101(b) of the Criminal Code of Georgia.

The court will also find the evidence more than sufficient to support the jury's findings that the devices involved here meet the definition contained in Section 26-2101(c) of the Criminal Code of Georgia.

CONCLUSION

In this case the state court has not decided a federal question of substance not heretofore determined by this court, but rather the state court has followed prior decisions of this court on the questions presented by the petitioner herein, and there being no special and important reasons why the Writ of Certiorati should be granted, it should be denied.

Respectully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent in Opposition to the Petition for Writ of Certiorari with first class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of _____, 1978.

LEONARD W. RHODES
Counsel for Respondent